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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

AMADOU LAMINE DIOUF, Plaintiff-Petitioner, v. ERIC H. HOLDER, JR., United States Attorney General, et al., Defendant-Respondents.	No. CV 06-7452-TJH (FMOx) **DEFENDANT-RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION FOR RECONSIDERATION OF COURT'S ORDER REGARDING 8 U.S.C. § 1231(a)(6)** Honorable Terry J. Hatter, Jr. Date: October 19, 2009 Time: 10:00 a.m. Courtroom: 17

I.

INTRODUCTION

Although Federal Rule of Civil Procedure 59(e) permits a district court to reconsider a previous order, the Ninth Circuit Court of Appeals has properly recognized that reconsideration offers an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." Kona Enterprises, Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000) (citing 12 James Wm. Moore et al., Moore's Federal Practice § 59.30[4] (3d ed. 2000)). The Ninth Circuit has consistently held that a motion brought pursuant to Rule 59(e), as this motion has presumably been brought under, should only be granted in "highly unusual circumstances." Id.; see also 389 Orange Street Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999). A Rule 59(e) motion should not be used to relitigate old matters, raise new arguments, or present evidence that could have been raised prior to the court's order. Carroll v. Nakatani, 342 F.3d 934, 945 (9th Cir. 2003).

The motion for reconsideration filed by Petitioner Amadou Lamine Diouf ("Diouf") is merely an attempt to reassert arguments previously made to this Court, but which were considered and rejected. See Local Rule 7-18 (stating, "[n]o motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion."). The only thing allegedly new that Diouf seeks to inject into the Court's consideration is a discussion of the recent decision of Rodriguez v. Hayes, 578 F.3d 1032 (9th Cir. Aug. 20, 2009), a non-binding class action certification case that does nothing to disturb the Court's decision and that was otherwise available for presentation to this Court well in advance of its September 9 order. Diouf fails to meet, or even cite, the relevant standards for a motion for reconsideration. See Fed. R. Civ. P. 59(e); C.D. Cal. Local Rule 7-18. Additionally, he has neglected to comply with Local Rule 7-3, which required the conference of counsel prior to the filing of his

motion for reconsideration.

In sum, Diouf's motion for reconsideration does not present any change in controlling law, new evidence, or clear error, and therefore, should be denied.

II.

ARGUMENT

A. STANDARD FOR GRANTING A MOTION FOR RECONSIDERATION

Diouf's motion is void of any citation to the Federal Rule of Civil Procedure or Local Rule upon which he relies. He presumably seeks reconsideration under Federal Rule of Civil Procedure 59(e) and Local Rule 7-18. The relevant standard for reconsideration is steep, and has not been met in this case. A motion for reconsideration may be made only on the following grounds:

> (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

Central District Local Rule 7-18. A motion for reconsideration is appropriate only if: (1) "the motion is 'necessary to correct manifest errors of law or fact upon which the judgment is based'; (2) the moving party presents 'newly discovered or previously unavailable evidence'; (3) the motion is necessary to 'prevent manifest injustice'; (4) there is an 'intervening change in controlling law.'" Turner v. Burlington Northern Santa Fe Rwy. Co., 228 F.3d 1058, 1063 (9th Cir. 2003)

(quoting McDowell v. Calderon, 197 F.3d 1253, 1254 n. 1 (9th Cir. 1999)).

Diouf fails to demonstrate he satisfies this burden.

B. DIOUF'S MOTION FOR RECONSIDERATION FAILS TO PRESENT ANY CHANGE IN THE CONTROLLING LAW, NEW EVIDENCE, OR CLEAR ERROR, AND THEREFORE SHOULD BE DENIED.

Diouf's presentation to the Court of Rodriguez v. Hayes does nothing to meet the standards for reconsideration in this case.[1] See Petitioner's Motion for Reconsideration ("Pet. Motion") at 1-5. First, Rodriguez does not change the controlling law applicable to this case, nor does Diouf claim that it does. See Local Rule 7-18(a). This is because Rodriguez is only a decision on whether a class of immigration habeas petitioners may be certified. Rodriguez, 578 F.3d at 1037. It is not a decision on the merits of any habeas claim. Indeed, the Supreme Court has firmly established that Federal Rule of Civil Procedure 23 does not authorize courts considering class certification to evaluate the merits of a petitioner's underlying claim. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."). This unequivocally means that any discussion in Rodriguez regarding the authority to detain any alien – including its discussion of the instant case – must be construed as neither binding nor relevant to the issue remanded for this Court's de novo consideration.

The direct order binding on this Court is the one issued by the Ninth

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[1] Respondents in Rodriguez are presently considering whether they will seek further review in the case. Following the granting of an extension motion, a petition for rehearing is due to be filed in the Ninth Circuit by November 4, 2009.

Circuit in Diouf v. Mukasey, 542 F.3d 1222, 1235 (9th Cir. 2008). The remanded issue properly decided by the Court was whether pursuant to 8 U.S.C. § 1231(a)(6), Diouf was entitled to an individualized bond determination, before a neutral decision maker, to determine the necessity of his prior detention, as opposed to the post-order custody review process that Diouf received pursuant to regulations at 8 C.F.R. § 241, et seq. Id. Importantly, the Ninth Circuit ordered that the issue be decided by this Court "in the first instance, with possible additional fact-finding and more focused briefing from the parties, whether Diouf is entitled to an individualized determination, before a neutral decision maker, of the necessity of his detention under § 1231(a)(6)." Id. Rodriguez can in no way trump that mandate, nor purport to offer this Court any persuasive reason to reconsider its decision. This is especially true considering the particularized briefing and evidence submitted by the parties in this case. This Court was specifically ordered to reach a de novo determination in light of such briefing and evidence. It has reached that decision. The subsequent class-certification case of Rodriguez – where the Ninth Circuit was not even considering the merits of a habeas claim, let alone the briefing and evidence considered by this Court – should in no way disturb the correct de novo determination reached by this Court pursuant to the Ninth Circuit's order in Diouf. Id.

Second, Diouf's explanation for not bringing Rodriguez to the Court's attention prior to this Court's decision falls short of demonstrating an "exercise of reasonable diligence," Local Rule 7-18(a), or showing that the case could not have been raised before its decision by supplemental notice to the Court. Nakatani, 342 F.3d at 945. Counsel for Diouf are the same as that in Rodriguez. Pet. Motion at 2. Rodriguez was also issued on August 20, 2009, well over two weeks before the Court's September 9, 2009 decision. Regardless, as discussed above, Rodriguez does not present a basis for reconsidering the Court's order in this case.

Finally, Diouf's attempt to utilize Rodriguez as a conduit to reargue his

case, must be rejected. Local Rule 7-18 ("[n]o motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion."). Specifically, their reliance on Rodriguez's discussion of Casas-Castrillon v. Department of Homeland Sec., 535 F.3d 942 (9th Cir. 2008) is merely a restatement of arguments already raised and rejected by this Court. Compare Pet. Motion at 1 (stating Rodriguez "strongly suggest[s] Mr. Diouf is entitled to a bond hearing under Section 1231(a)(6)) (emphasis added) with Petitioner's Supplemental Reply Brief ("Pet. Supp. R. Br.") at 13 (arguing "the Ninth Circuit's recent decision in Casas-Castrillon strongly suggests that this Court must construe the statute to authorize such hearings.") (citing Petitioner's Supplemental Brief ("Pet. Supp. Br.") at 5-8) (emphasis added). Diouf also reargues that the Court's decision required consideration of the due process rights of other individuals detained under section 1231(a)(6), such as lawful permanent residents. Pet. Motion at 3; but see Pet. Supp. R. Br. at 13 (arguing "the Court must construe the statute in light of the constitutional concerns raised by its application to admissible non-citizens generally, not just Mr. Diouf.") (citing Pet. Supp. Br. at 7 -8). Likewise, citing Zadvydas v. Davis, Diouf argues that the Court's decision is in error because the "basic purpose" of "all immigration detention statutes" is to "assur[e] the alien's presence at the moment of removal." Pet. Motion at 4 (citing 533 U.S. 678, 699, 121 S. Ct. 2491, 2502, 150 L. Ed. 2d 653 (2001)). But this argument is not new. See Pet. Supp. Br. at 9 (arguing "[i]n the immigration context, the primary purpose of detention must be to ensure the non-citizen's availability for removal proceedings and for removal itself, if the government prevails.") (citing Zadvydas, 533 U.S. at 690). The argument was also properly rejected by the Court when it explained that Zadvydas itself holds that "the nature of due process protection may vary depending on the status and circumstances of the alien." Doc. 74 at 3 (citing Zadvydas, 533 U.S. at 694).

In sum, Diouf's motion for reconsideration arguments have already been

raised, litigated, and properly rejected. The Court should therefore deny Diouf's request to relitigate these matters where no manifest error in the Court's order has been demonstrated. Nakatani, 342 F.3d at 945. Rodriguez can in no way compel a contrary result.

C. DIOUF'S FAILURE TO COMPLY WITH LOCAL RULE 7-3

An independent basis to deny Diouf's motion for reconsideration lies in his unexplained failure to comply with Central District of California Local Rule 7-3. Local Rule 7-3 requires "counsel contemplating the filing of any motion" to first contact opposing counsel "to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution."[2] L.R. 7-3 (emphasis in original). The rule also imposes a timeline for that meeting: for motions that must be filed within a certain time period according to the Federal Rules of Civil Procedure, the conference "shall take place at least five days prior to the last day for filing the motion"; all other motions require conference "at least twenty days prior to the filing of the motion." Id.

The five day deadline applies to this case. Although Diouf never specifies under what Federal Rule of Civil Procedure he seeks reconsideration, presumably he does so under Federal Rule of Civil Procedure 59(e), which must be filed "no later than ten days after the entry of the judgment." This Court's order denying his preliminary injunction request was issued on September 9, 2009. Diouf had ten days from that date to file his motion for reconsideration, and was required by Local Rule 7-3 to confer with Respondents' counsel five days prior. He offers no explanation regarding his failure to do so.

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[2] A motion for reconsideration is not exempt from this requirement. See Local Rule 7-3 (exempting only cases specified in Local Rule 16-12, cases connected with discovery motions (which are governed by Local Rule 37-1 through 37-4), and applications for temporary restraining orders or preliminary injunctions, which this motion for reconsideration is not).

Thus, although the reasons discussed above provide independent and compelling grounds to deny the motion for reconsideration, Diouf's failure to comply with Local Rule 7-3 should also result in a denial of his motion.

III.

CONCLUSION

For the forgoing reasons, this Court should deny Petitioner's motion for reconsideration.

Respectfully submitted,

Date: October 2, 2009

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CERTIFICATE OF SERVICE

Case No. CV 06-7452 TJH (FMOx)

I hereby certify that on this 2nd day of October 2009, true and correct copies of the **Defendant-Respondents' Opposition to Petitioner's Motion For Reconsideration Of Court's Order Regarding 8 U.S.C. § 1231(a)(6)** were served pursuant to the district court's ECF system as to the following ECF filers:

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